Another efficiency resulting from the Cleveland LMA is the cooperative use of a film/program library by both WOIO(TV) and WUAB(TV). Both stations will be able to utilize "runs" of film product which might otherwise go unused if licensed for use only on one station in the market. Malrite has had the expertise and industry contacts, developed over 40 years, to accomplish this efficiency.

Additional efficiencies to be reaped as the consequence of the Cleveland LMA include the elimination of duplicate photocopying machines, postage machines, other general office supplies, duplicative travel and entertainment expenses, etc. Malrite estimates the value of these efficiencies in the first full year of operations at approximately $500,000 to $700,000. Without the LMA, Malrite and the licensee of WUAB(TV) would not be able to realize these efficiencies.

The cost efficiencies of the LMA have allowed WOIO(TV) and WUAB(TV) to develop a joint venture with Cleveland area schools which is designed to facilitate in-school instruction regarding meteorology. In a joint venture with Cleveland area schools, WOIO(TV) and WUAB(TV) has created "WeatherNet", a fully automated weather observation system designed to help further the education of local students as well as to make the weather forecasts of the two stations even more accurate. An important participant in this venture is WOIO(TV) and WUAB(TV) Chief Meteorologist and former 8th grade science teacher Dave Sweeney. WeatherNet will provide a state-of-the-art user-friendly way to integrate lesson plans in science, math, geography, reading, computer technology and telecommunications. Using WeatherNet systems, students in schools to collect meteorological data for use by Dave Sweeney to track current weather conditions throughout the Cleveland area. Temperature, barometric pressure, humidity level, wind velocity, and other weather data can be studied by students through the use of WeatherNet. A number of WeatherNet systems will be made available to Cleveland-area schools <u>at no charge</u>,, by WOIO(TV) and WUAB(TV). This innovative educational and instructional project simply could not have been achieved in the absence of the WUAB(TV) LMA and the cost efficiencies that are being reached as a result of it.[30]

Empirical evidence demonstrates that the WOIO(TV)/WUAB(TV) LMA has not resulted in undue concentration in the Cleveland market. More particularly, a comparison of the combined audience share of WOIO(TV) and WUAB(TV) before implementation of the LMA with the combined audience share of the stations after commencement of the LMA shows that the combined share has actually <u>decreased</u> over time. <u>See</u> Exhibit 10. This is hardly

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[30] Annexed hereto as Exhibit 14 is a reprint of the May 7, 1995 <u>Cleveland Plain Dealer</u> Newspaper, which sets forth information regarding WeatherNet.

surprising, since WOIO(TV) and WUAB(TV) target different audiences, and, often, different advertisers. See Exhibit 12.

The WOIO(TV)/WUAB(TV) LMA has generated accolades from the Cleveland community. As noted above, in February 1995, the Editorial Board of the Call and Post, Ohio's African-American newspaper, heralded the fact that "Clevelanders have been given an unprecedented opportunity to enjoy diversity, both in front of and behind the camera."[31]

Malrite's positive experience with a television LMA is not unique. For example, an LMA also saved a television station in Michigan from going dark. WOTV(TV), the ABC affiliate in that market, was squeezed by competition from an overlapping ABC affiliate, the entrance of new stations into the market, as well as increased programming costs. Even after eliminating its local news programming, the station continued to lose money. In 1991, it entered into an LMA with an NBC affiliate in Grand Rapids, Michigan. Reportedly, WOTV(TV) is one again profitable and is producing local news programming.

Similarly, Kentuckiana Broadcasting held a construction permit for Channel 58 in Salem, Indiana, but found that it was unable to secure its financing to build the station. As the

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31 A copy of the Call and Post editorial is annexed hereto as Exhibit 7 hereto.

result of an LMA with Television Station WDRB(TV) in Louisville, Kentucky, Kentuckiana Broadcasting was able to obtain financing and now provides another programming choice for viewers in its market.

In each of these instances, the public interest in assuring diversity and continued competitiveness was affirmatively served by the use of LMA arrangements. For these reasons, the Commission should not adopt any rules or policies in this proceeding which would artificially restrict the use of LMAs for television.

C. The Commission Should Adopt Appropriate "Grandfather", Transferability, And Conversion Policies With Respect To Existing Television LMAs, Regardless Of Any Changes In The Television Duopoly Rule Which May Be Adopted In This Proceeding

While television LMAs are currently unrestricted, in 1992 the Commission adopted guidelines primarily applicable to AM and FM radio LMAs. Revision Of Radio Rules And Policies, 7 FCC Rcd 2755, 2784-89 (1992). These guidelines were affirmed and clarified in both the First Reconsideration Order in Revision Of Radio Rules And Policies, 7 FCC Rcd 6387 at 6400-6402 (1992), and the Second Reconsideration Order in that proceeding, 9 FCC Rcd 7183 (1994). Specifically, the Commission there required that a licensee's time brokerage of any other radio station in the same market for more than 15 percent of the brokered station's weekly broadcast hours would result in counting the brokered station toward the brokering licensee's national and local ownership limited. See Section 73.3555(a)(2)(i) of the Commission's Rules. The Commission also required that most radio LMAs be kept in the local public inspection files of the stations involved and also be filed with the Commission. See Section 73.3613(d) of the Commission's Rules. The Commission also required that copies of television station LMA agreements should be kept at the station and be made available for inspection upon request by the Commission. See Section 73.3613(e) of the Commission's Rules.

In its NPRM in this proceeding, the Commission tentatively proposed to treat LMAs involving television stations in the same basic manner as it does LMAs involving radio stations. That is, the Commission proposed that the time brokerage by a television station licensee of another television station in the same market for more than 15 percent of the brokered station's weekly broadcast hours would result in counting the brokered station toward the brokering licensee's national and local ownership limits. If such a rule were to be adopted in this proceeding, and if the television duopoly rule is not relaxed from its present form, such an attribution provision would preclude television station LMAs in any market where the time broker owns or has an attributable interest in another television station.

In the event that the television duopoly rule is not relaxed, and if, as a result, such LMAs are restricted in such a fashion, the Commission should "grandfather" LMAs entered into among two television stations in the same market before the December 15, 1994 adoption date of the NPRM in this proceeding, and such "grandfathering" should be applicable to the entire term of such agreements, including both during the initial term of any such agreements and during any renewal or extension terms of those agreements, irrespective of whether the television duopoly rule is modified in this proceeding. Moreover, regardless of any changes in the television duopoly rule adopted in this proceeding, the Commission should allow the contract rights associated with such existing "grandfathered" television LMAs to be transferrable when the brokering station is sold.[32]

Analogous "grandfathering" provisions were adopted by the Commission in relation to radio broadcast LMAs entered into prior to the effective date of the revised radio duopoly rule. See Revision of Radio Rules and Policies, 7 FCC Rcd 6387, 6402 (1992), on further reconsideration, Revision Of Radio Rules and Policies, 9 FCC Rcd 7183, 7192-93 (1994).

Grandfathering existing LMAs would also be the only equitable way to deal with such existing LMA arrangements. The

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[32] Furthermore, the Commission should permit interests by the brokering station in the brokered station, under such "grandfathered" LMAs, to be converted into a full ownership interest in the brokered station, irrespective of the revisions to the television duopoly rule which may be adopted by the Commission in this proceeding.

Commission must certainly recognize that the multitude of existing television LMAs were entered into in good-faith reliance on the Commission's established body of precedent regarding LMA arrangements. Indeed, the Commission must certainly have been cognizant of the fact that television LMAs were in existence, given the press coverage given to such arrangements over the last several years. Yet, to date, the Commission has issued no pronouncement suggesting and directing television licensees not to enter into LMAs. Based on all the foregoing, substantial expenditures of resources were made by television licensees in good faith reliance on the fact that television LMAs if properly structured as to assure licensee control could be entered into consist with Commission precedent. Under these circumstance,s it would be particularly inequitable and draconian for the Commission to declare, in effect, that television LMAs presently in existence must be terminated. Clearly, grandfathering of existing LMAs would provide the only equitable remedy under these circumstances.

In sum, the Commission should allow the continuation of existing television LMAs, including all extensions and renewals to which the parties may agree. LMAs are often entered into among broadcasters in anticipation of a much longer cooperative arrangement, or the possible conversion of the time broker's interest in the LMA into ownership of the brokered station. While an initial term of an LMA may provide for a limited duration, nonetheless, if the venture proves to be profitable and successful, the parties will generally either extend the relationship, or convert the LMA into an ownership interest. Existing LMAs, therefore, were likely entered into by the parties with the contemplation that the arrangement in question could be extended.

It must be recognized, in this regard, that these cooperative LMA arrangements usually involve a substantial expenditure of resources, particularly in the television area, that can only be recouped in a more long-term arrangement among the parties. Consequently, the Commission should allow for the "grandfathering" of existing television LMAs, and should not unnecessarily interfere with the more long-term investment expectations of the parties, particularly since, as shown above, TV LMAs achieve significant public interest benefits without harming either diversity or competition.

VI. <u>Conclusion</u>

In this proceeding, the Commission has a unique opportunity to restructure the multiple ownership rules applicable to television stations so as to provide greater flexibility for television licensees to meet the challenges posed by operating in today's highly competitive multi-channel programming environment.

For the reasons set forth above, the Commission should liberalize the current television duopoly rule to permit UHF-UHF duopolies within the same market, and to permit common ownership of either (i) a UHF television and a VHF station in the same market, or (ii) two VHF television stations in the same market on a case-by-case basis, where the applicant can demonstrate that such a UHF-VHF duopoly or such a VHF-VHF duopoly will not harm competition. In addition, but not as a substitute for, the foregoing, Malrite endorses the Commission's proposal to relax the present television duopoly rule by decreasing its prohibited contour overlap from Grade B to Grade A, so that television stations would be deemed to be operating in the same market, for purposes of the duopoly rule, only if their respective Grade A contours overlap with one another.

As shown above, these liberalizations in the duopoly rule recognize that the existing duopoly rule for television is outdated in light of today's diverse, changing and highly competitive multi-channel video marketplace. Today, UHF television licensees, as a whole, as well as certain discreet independent VHF television stations, continue to be disadvantaged, and liberalization of the television duopoly rule will assist such stations by affording them the opportunity to take advantage of economies of scale and thereby achieve efficiencies of operation and reduced costs, leading to greater financial viability. More importantly, liberalization of the television duopoly rule will not adversely affect either competition or diversity in local television markets.

Moreover, for the reasons set forth above, the Commission should adopt guidelines that "grandfather" existing LMAs so as to permit their continuation, including all extensions and renewals, and should also permit transferability of contract rights under existing LMAs. As shown above, substantial public interest benefits can be achieved through the use of television LMAs.

Respectfully submitted,

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May 17, 1995

Exhibit 1

Cable Households

	Cable Penetration	Cable Households
National	66%	60,495,090
Cleveland	66%	963,880

sources: National - May 1, 1995 Broadcasting & Cable (Nielsen, NCTA), Cleveland - Feb '95 NSI.

Exhibit 2

Cleveland VHF Television Station Circulation versus WOIO/WUAB UHF Circulation

Total Cleveland DMA circulation is the percent of Cleveland DMA homes reached weekly by a television station.

[redacted]

VHF Stations		
WKYC	WJW	WEWS
88	90	90

WOIO/WUAB	
WOIO	WUAB
74	77

[redacted]

VHF Stations		
WKYC	WJW	WEWS
78	76	81

WOIO/WUAB	
WOIO	WUAB
56	54

Source: May'04 Nielsen, Cleveland DMA Weekly HH Cume Percent

Exhibit 3

The VHF Network Advantage

The VHF signal is technically superior to the UHF signal. This results in a decided ratings advantage for VHF stations. In 29 of the 33 markets where a network UHF affiliate competes against network VHF affiliates, the UHF station is the lowest rated.

Black=VHF
Red=UHF

Market	Market Rank	Feb'95 Share ABC	Feb'95 Share NBC	Feb'95 Share CBS
Detroit	9	21	21	9
Atlanta	10	21	15	11
Cleveland	13	20	19	12
Tampa Bay	15	13	18	16
Hartford	26	16	14	19
San Diego	27	15	14	13
Charlotte	28	20	9	23
Milwaukee	29	19	21	9
Kansas City	31	19	11	20
Raleigh	32	24	9	25
W. Palm Beach	45	11	21	17
Louisville	50	22	19	20
Birmingham	51	31	18	10
Dayton	53	20	11	29
Jacksonville	55	11	18	28
Flint-Saginaw	60	25	17	18
Toledo	64	13	29	26
Springfield, MO	80	13	22	24
Jackson	90	15	25	25
Burlington	92	8	16	26
Tri-Cities, TN-VA	93	8	26	23
Savannah	102	11	13	31
Lansing	106	9	16	29
Montgomery	111	10	26	27
Augusta	108	23	12	27
Eugene	117	17	14	23
Columbus, GA	122	28	7	18
Terre Haute	144	8	16	31
Lubbock	152	17	27	26
Columbia-Jefferson City	149	16	24	31
Abilene	160	19	18	25
Hattiesburg	169	22	34	13
Rapid City	174	24	18	10

source: Feb'95 NSI, Sun-Sat 7a-1a network household share (markets

Exhibit 4

The VHF Independent Advantage

Black=VHF
Red=UHF

The VHF signal is technically superior to the UHF signal. This results in a decided ratings advantage for VHF stations. In all 19 markets where an independent UHF competes against an independent VHF, the UHF station is the lower rated.

New York (1)	Share
WNYW - 5 (Fox)	10
WPIX - 11	10
WWOR - 9	9
WNJU - 47	1

Los Angeles (2)	
KTTV - 11 (Fox)	10
KTLA - 5	9
KCOP - 13	8
KCAL - 9	6
KMEX - 34	4
KVEA - 52	1

Chicago (3)	
WGN - 9	12
WPWR - 50	8
WFLD - 32 (Fox)	6
WGBO - 66	3
WCIU - 26	1
WCFC - 38	1

San Francisco (5)	
KTVU - 2 (Fox)	12
KBHK - 44	6
KOFY - 20	5
KICU - 36	2
KTSF - 26	1

Washington, D.C. (7)	
WTTG - 5 (Fox)	14
WDCA - 20	6
WFTY - 50	1

Dallas (8)	Share
KTVT - 11	8
KDAF - 33 (Fox)	7
KTXA - 21	5
KXTX - 39	3
KDFI - 27	3

Seattle (13)	
KCPQ - 13 (Fox)	9
KSTW - 11	7
KVOS - 12	1
KTZZ - 22	1
KTBW - 20	1

Minneapolis (14)	
KMSP - 9	12
KITN - 29 (Fox)	6
KLGT - 23	2

Miami (16)	
WSVN - 7 (Fox)	12
WDZL - 39	7
WBFS - 33	6
WLTV - 23	6
WSCV - 51	4

St. Louis (18)	
KPLR - 11	11
KDNL - 30 (Fox)	9
KNLC - 24	1

Phoenix (20)	
KPHO - 5	7
KNXV - 15 (Fox)	8
KUTP - 45	5

San Diego (24)	Share
XETV - 6 (Fox)	9
KUSI - 51	6
KTTY - 69	3

Indianapolis (26)	
WTTV 4	10
WXIN - 59 (Fox)	9
WMCC - 23	3
WHMB - 40	1

Portland (27)	
KPTV - 12	12
KPDX - 49 (Fox)	7

Salt Lake City (38)	
KSTU - 13 (Fox)	12
KJZZ - 14	4

Albuquerque (50)	
KASA - 2 (Fox)	7
KLUZ - 41	1

Honolulu (70)	
KHNL - 13 (Fox)	9
KFVE - 5	4
KIKU - 20	1

Las Vegas (75)	
KVVU - 5 (Fox)	14
KRLR - 21	4
KFBT - 33	2

Tucson (81)	
KMSB - 11 (Fox)	7
KTTU - 18	3

Source: Petry Research, May'94 NSI, Mon-Sun 6a-2a household share, markets with both VHFand UHF independents

Exhibit 5

n/e/r/a
National Economic Research Associates, Inc.
Consulting Economists

An Economic Analysis of the Relevant Advertising Market(s) Within Which to Assess the Likely Competitive Effects of The Proposed Time Brokerage Arrangement Between WUAB Channel 43 and WOIO Channel 19

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July 15, 1994

White Plains, NY / Washington, DC / Los Angeles
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London / Madrid

A Marsh & McLennan Company

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N Kimberly P. Harrison, "WOIO Plots Big Push to Revamp Viewer Habits," *Crain's Cleveland Business*, July 11-17, 1994, pp. 1, 18.

O The Competitive TV Landscape Changes: Pre and Post CBS-Fox Affiliation Switch

I. INTRODUCTION

A. Scope of Assignment

National Economic Research Associates, Inc. has been retained by Kaye, Scholer, Fierman, Hays & Handler, counsel for Malrite Communications, Inc. ("Malrite" or "Channel 19" or "WOIO"), in connection with its proposed time brokerage arrangement with WUAB Channel 43 ("WUAB"). Both to be conservative and to simplify our analysis, we assume, contrary to fact, that Malrite has proposed a complete acquisition of WUAB.

More precisely, in response to a specific request by the Department of Justice ("DOJ"), we have been asked by counsel to assess the available empirical information pertinent to delineating the boundaries of the relevant product market(s) for local spot television advertising. As we understand it, the DOJ has requested information pertaining to the degree of cross-elasticity of demand between local spot advertising on television and other media — e.g., radio, cable television, newspapers, magazines, direct mail.[1]

In light of the relatively short time available to conduct our analysis, we have relied upon several sources of information. These include the following: trade and professional literature; documents prepared and/or maintained by WOIO in the ordinary course of business; academic and government publications pertaining to competition in advertising markets; conversations with Malrite personnel; and telephone interviews with a sample chosen from a list of advertisers and advertising agencies provided by Malrite. We have also drawn upon the techniques and principles of modern microeconomic theory and industrial organization economics, as well as our own practical experience in analyzing the competitive impact of mergers, acquisitions and other trade practices within the context of antitrust proceedings and investigations generally, and within media markets in particular.

[1] Cross-elasticity of demand is a measure of the percentage change in the demand for one good, say, local spot advertisements on television, that results from a one percent change in the price of another good, say, local spot advertisements on radio. If this number is positive, the two goods are said to be substitutes. Conversely, if it is negative, the two goods are complements. If there is no statistical relationship between the two goods — i.e., the measured cross-elasticity is statistically not different from zero — then the demand for the two goods are unrelated to one another.

B. Plan of the Study

The focus of our analysis is the boundaries of the relevant product market for local advertising within the Cleveland Designated Market Area ("DMA")[2] and, as well, the nature of competition for the purchase and sale of advertising therein. Our report is organized as follows: Section II contains a brief overview of the process by which the boundaries of a relevant product market are determined. Section III presents and summarizes the information available on the nature and extent of the appropriate relevant market, i.e., a market which encompasses competition across media. In Section IV, we describe the nature and extent of competition in the narrowest possible hypothetical product market — i.e., broadcast television local spot advertising.[3]

C. Summary of Conclusions

Based upon the information available to date, we have reached the following conclusions:

- The data required to construct formal statistical estimates of cross-elasticities of demand within the Cleveland DMA are not available. Most local spot television prices result from bilateral oral negotiations between sellers and buyers of advertising; given this, we are at present unaware of any records, other than invoices held by all media participants and their advertiser-customers, that may reveal transaction prices or other relevant data needed to estimate cross-elasticities.

- Nevertheless, we believe there is sufficient information available from a variety of sources upon which to conclude that there exists a relevant product market for local advertising messages encompassing all media — including both electronic media, e.g., radio, broadcast and cable, and nonelectronic media, e.g., direct mail, newspapers, magazines, yellow pages and billboards. For simplicity, we refer to this as the "advertising market."

- Even were one to assume a hypothetical market encompassing only local spot advertising available only over broadcast television (i.e., excluding cable), the nature of competition would prevent the exercise of market power by any station or group of stations. Indeed, the vigorous bilateral negotiations during which

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2 That is, for purposes of this report, we assume the geographic dimension of the relevant market within which to assess the proposed local marketing agreement between WUAB and WOIO is no larger than the Cleveland DMA.

3 We note that there may well exist markets which lie between these two alternatives. Time does not permit a full examination of these alternatives in this report.

prices are determined and the negotiating power of many of the stations' most important advertisers act to constrain the possibility of anticompetitive conduct.[4]

- More specifically, prices are individually negotiated, without either the guidance or predictability afforded by rate cards; this makes the likelihood of successful coordination or anticompetitive pricing remote. Indeed, larger advertisers — for whom television advertising tends to be relatively important — have the ability to play stations against one another to gain competitive terms of sale. Relatively smaller advertisers are less likely to consider local broadcast television spots as crucial in their advertising plans. Accordingly, based on this study, they are more likely to consider other media — e.g., radio, cable television, newspapers and direct mail — as effective substitutes. This ability to move to other media when economic conditions warrant also provides an effective competitive constraint.

- The current size and position of cable in this market substantially understates its future competitive importance. Cable's ability to compete for television advertising dollars will expand commensurately as it continues: (1) to grow in size and importance with stronger rated programming; (2) to use its large and growing subscriber base to fund its advertising business; and (3) to exploit its market via local and regional interconnects. Moreover, the anticipated future growth of new media — e.g., direct broadcast satellite ("DBS"), low-power stations, wireless, video dial tones and computerized information services such as *Prodigy* and *America Online* — will likely increase further the competition for advertisers' business.

II. Relevant Market Definition

Markets are the arenas within which competition occurs, and firms typically operate in a variety of markets. Indeed, depending upon the behavior under consideration, one or more such markets may be relevant to the analysis of the competitive implications of that behavior. Market definition is undertaken as a first step in the identification and analysis of potential competitive effects of a given business practice.

A relevant market is the smallest market in which market power — e.g., the ability profitably to sustain price above competitive levels or to exclude rivals — could conceivably be exercised and that is appropriate to the competitive practice at issue. Accordingly, relevant markets must necessarily reflect the commercial realities and the boundaries governing firms'

[4] While we discuss this in more detail below, we believe that the substantial reduction in the competitive overlap of WOIO and WUAB resulting from WOIO's recent affiliation with CBS reinforces this conclusion.